

Ghulam Rasool Azad and Vs. State of J. and K. and

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Court : Jammu and Kashmir

Decided On : Apr-08-1993

Reported in : (1994)ILLJ699J& K

Judge : Abdul Qadir Parray, J.

Acts : J & K Civil Services Regulations - Article 226(2)

Appeal No. : S.W.P. Nos. 896 and 1119/1987

Appellant : Ghulam Rasool Azad and ;assadullah War

Respondent : State of J. and K. and ;state of J and K and ors.

Disposition : Petition allowed

Judgement :

Abdul Qadir Parray, J.

1. This judgment will dispose of above noted two writ petitions. Both these writ petitions arise out of orders of premature retirement purported to have been passed by the Govt. vide Order No. 295-FST of 1987 dated September 9, 1987 and Government Order No. 292-FST of 1987 dated September 9, 1987 against the petitioners respectively.

2. The facts in brief in SWP No. 896/1987 are : that the person of Ghulam Rasool Azad was appointed as Clerk vide Chief Conservator of Forest's order No. 116 Dated September 8, 1961, whereafter the petitioner was appointed as Forester vide Chief Conservator of Forest's Order : No. 132 dated September 6, 1982. It is further averred in the petition that the petitioner's date of birth is April 15, 1938, as such, he is going to retire from service in the year 1996. However, the respondent in terms of Govt. Order No. 295-FST of 1987 dated February 9, 1987 retired the petitioner from service prematurely with effect from September 10, 1987 by invoking the powers conferred by Article 226 (2) 226 (3) of the J&K; Civil Service Regulations on the assumption that the official has completed 25 years of qualifying service and this power has been exercised in public interest. The petitioner's service career has remained unblemished all along. The impugned order has visited the petitioner with civil consequences as same has amounted to infliction of punishment to the petitioner.

3. Similarly in SWP No. 1119/97, petitioner Assadullah War has been prematurely retired from service per Govt. Order No. 292 of 1987 dated September 9, 1987. It is averred that the petitioner was appointed as Watcher in the Forest Department on May 14, 1962 and subsequently promoted to the post of Forest Guard vide Order No. 3026-30 dated February 5, 1966. The petitioner was detained under Public Safety Act vide District Magistrate Baramulla's Order No. DMB/PSA/D/324/87 dated September 10, 1987. The said order of detention was challenged through the Habeas Corpus petition No: 203 of 1987 titled Ghulam Nabi Dar v. State, However, during the pendency of the writ petition, the Govt. revoked the order of detention per Govt. Order No. Home--SD/410 of 1987 dated : October 14, 1987 and in the meanwhile, Government passed the impugned order and retired the petitioner from service in exercise of the powers vested under Art. 226(2) and 226(3) of the J&K; Civil Service Regulations on the count that the petitioner has rendered 25 years of active service and shall retire from service on September 10, 1987 F.N.

4. Respondents were served and in response they appeared and filed the counter affidavit in SWP No. 896/1987 and miserably failed to file any counter affidavit in SWP No. 1119/1987.

5. In the counter affidavit filed in SWP No. 896/87, the respondent has stated that the petitioner was posted as Forester in Khuru Batapora in August 1985. On August 4, 1985, the Divisional Forest Officer (D.F.O.) concerned received a report that a huge quantity of illicit timber was cut from the beat. He went on spot with forest protection force and recovered huge quantity of timber. However, the local staff including the petitioner absconded from the scene of activity which as per averments made in the counter affidavit by the State, establish the fact that the petitioner was also involved in the offence.

6. In the rejoinder affidavit, the petitioner has denied the averments made in the counter affidavit as completely false and baseless by saying that the petitioner does not know that any report has been lodged regarding felling of illicit timber and further reiterates that he has never absconded from the scene of activity nor can the same be inferred. He has further reiterated that assuming the averments as true and not admitting the same, but there was nothing which would have forbidden the respondent/State to conduct an enquiry into the matter and punish the guilty and on the other hand, the report lodged by DFO says that the Beat In charge Forest Guards whose involvement in the episode was not above board, was being shifted and attached to the Divisional Office and that they will remain present in the Beat during the course of inspection of forests when proper administrative action would be taken against them. No action has, however, been taken against these Forest Guards in terms of letter dated : May 6, 1985. He has further reiterated on oath that till 1988 before submitting the counter affidavit by the respondent State, letter No. 1622-23 dated: August 6, 1985 addressed by DFO concerned to the Conservator of Forests has never been dispatched from the office of Conservator of Forests and only in the year 1988, the said letter was forwarded to the Government, otherwise the counter filed by the State would have spoken and stated accordingly.

7. Thus the petitioner Gh, Rasool Azad in the Rejoinder Affidavit has joined the issue that it is highly doubtful as to whether the Government was in know of the letter alleged to have been addressed by Divisional Forest Officer concerned to Conservator of Forests before issuance of the order of retirement against the petitioner. On the other hand, the petitioner submits that as Forester, he has taken

sufficient safeguards to protect the forest and he has never been negligent in the performance of his duties nor has he ever connived with any person. He has further re-iterated that the letter speaking about the loss/felling of timber in beat Khuru Batampora reported in August 1985 was in fact making averments that beat incharge Forest Guards were responsible for damages to the forests. However, till date no action has been taken against the said Forest Guards and the axe has fallen on the petitioner by retiring him prematurely. So there was no material, documentary or otherwise, available before the Government at the time of passing of the impugned order and the order as such was issued whimsically and capriciously.

8. Heard learned counsel for the parties at length, perused the material on the record and I had the occasion to go through the relevant provisions of law.

9. In order to appreciate the facts as marshalled above and to see the legal position let me quote the provisions of Article 226(2) of the J&K; Civil Service Regulations which provide as under:-

'Notwithstanding anything contained in these Regulations, Government may, if it is of the opinion that it is in public interest to do so, require any Government servant other than the one working on a post which is included in the Schedule II of these rules, to retire at any time after he has completed 22 years/44 completed six monthly period of qualifying service or on attaining 48 years of age, provided that the appropriate authority shall give in this behalf a notice (in one of the forms prescribed in Annexures A & B hereto as the case may be), to the Government servant at least 3 months before the date on which he is required to retire or pay 3 months pay and allowances in lieu of such a notice Such a Government servant shall be granted pensionary benefits admissible under the rules on the basis of qualifying service put in by him on the date of such retirement.'

Explanation: A Government servant who is retired immediately after allowing him pension and allowances in lieu of notice will be entitled to pension from the date of such retirement and the pension shall not be deferred till after the expiry of three months for which he is paid pay and allowance.'

10. It may be noted that Article 226 of the J&K; Civil Service Regulations provides that an officer/official is required to retire from service after attaining the age of 58 years. However, it is open for the appointing authority to retain in service the said officer on public grounds on the count that the Competent authority being satisfied about his efficiency in the service. However, no Government servant can be retained in service after attaining sixty years of age except in very special circumstances. So the provisions referred to hereinabove clearly show that officer has a right to stay in service till he attains the age of superannuation.

11. Article 226(2) of the J&K; CSR is the enabling provision for the Government and gives undoubtedly absolute powers to the Government to retire a Govt. servant at any time after the Government servant has completed 22 years/ 44 completed six monthly period of qualifying service or on attaining the age of 48 years of age. Thus before a Government servant can compulsorily be retired from service under Article 226 (2) of the Civil Service Regulations, the Government has to comply with the following tests:

(i) That the Government should obviously form an opinion about the compulsorily retirement of a Government servant who has completed the prescribed qualifying service or who has attained the age of 48 years.

(ii) That the objective opinion of the Government should be in the public interest;

(iii) That the objective opinion of the Government in public interest should include and require the Government to compulsorily retire the Government servant;

(iv) That in such an eventuality, the Government servant is entitled to three months notice and/or three months pay and allowance in lieu of notice.

(v) That the officer so retired is entitled to pensionary benefits admissible under the rules on the basis of his qualifying service.

12. To culminate all these arguments, it is necessary that while exercising the powers by the Government under Article 226(2) of the J &K; Civil Service Regulations, it is necessary that the opinion of the Government should be based on objective satisfaction of the material which is the service record of the

Government servant and that the opinion should not be based on extraneous, collateral and alien considerations. The action should be motivated only by public interest and not to any other oblique motive like political or personal, that means the Government should be genuinely satisfied on the overall objective assessment of the service record of the Government servant before taking any action :under the said provision of the Regulation. The action proposed shall not lack in bonafides and should be free from malafides in fact and such other considerations as constitute malice in law. The action of the Government should in no way be arbitrary or unreasonable, should be based purely on public interest and in case the intended action taken by the Government is violative of the limitations as stated hereinabove the Government action is liable to be quashed.

13. As per the law laid down by the Supreme Court reported in AIR 1987 SC 1948, relied upon by the petitioner, it is now an admitted fact that before retiring a person prematurely from service, his service record of past five years has to be considered and if there is any adverse remark against the person intended to be retired, which has been communicated and the representation against the said adverse entries have been communicated an order of pre-mature retirement can validly be passed by the Government and the concept that the action is being taken in public interest means in relation to public administration which envisages retention of honest and efficient employees in service and dispense with the services of those who are inefficient, dead-wood and corrupt and dishonest. This objective must be in mind and to reach this conclusion, the records of the persons who are intended to be weeded out from the service prematurely must substantiate these objectives.

14. The judgment (supra) referred to by both the counsels namely M/S.R. Hussain and BA Bashir, no doubt establishes and gives absolute right to the Government that the Government can take action under the provisions of Article 226 (2) of the J & K CSR, but the underlying feature of the judgment is that action must be objective one and bonafide and based on relevant material.

15. The judgment of the Hon'ble apex court reported in AIR 1987 SC 1948 (supra) further lays down that the Government had a right to prematurely compulsorily

retire an employee, to weed out the in-efficient, corrupt and dis-honest and dead wood from the Government service, but the said right is to be exercised in accordance with the rules and within the ambit of constitutional rights and limitations of the Govt servant. The rule of law is to be followed by the State while exercising its executive powers while passing any adverse order against an individual employee or class of employees. If any body feels aggrieved of the action taken by the executive and challenges the action before a competent court, the executive is no doubt under legal and constitutional obligation to justify that the action taken is within the legal and constitutional parameters.

16. Examining the petitioner's case in the above context, the counsel for the petitioners vehemently argued and also reiterated that the Government has not been in a position to produce any substantial record or even adverse entries against the person of the petitioners on record to show that in any way the petitioners were corrupt, dishonest, inefficient and that their service records reveal like that or that at any stage prior to their retirement for the last five years any adverse remark has been made in their APRs and those adverse remarks have been communicated to the petitioners and the petitioner having represented thereto, the action has been taken by the authorities. In fact so many things are left and no many blanks are yet to be filled before proposed action should have been taken by the Government in prematurely retiring the petitioners.

17. Similarly in case of Assadullah War, petitioner in SWP No: 1119/87, before passing of the order impugned, the petitioner seems to have been arrested and detained under Public Safety Act vide order passed by the District Magistrate, on September 10, 1987 and he having challenged the said order by way of H.CNo.203 of 1987, but during the pendency of said petition, the Government has revoked the order of detention per order No. Home-ISD/410 of 1987 dated October 14, 1987 and in the meanwhile impugned order dated: prematurely retired (sic).

18. Keeping under consideration the above arguments coupled with other facts which have been brought on record in this petition, I do find that before powers are to be exercised by Government under Article 226(2) of the J & K CSR, it is

necessary and incumbent that the opinion of the Government should be based on objective satisfaction of the petitioner's service record and that the opinion should not be based on extraneous, collateral and alien considerations. The action of the Government should be inspired by reasons and should be relevant to the intended action and as rightly pointed out, the action should be motivated only by public interest and not by any other oblique interest, political or personal. For achieving this purpose, the Government should be genuinely satisfied on the overall objective estimation of the service record of the Government servant before taking any action under the provisions of the Civil Service Regulations. Action should not lack bonafides in fact and in law and should be free from all malice in fact as well as in law, and the action should not be arbitrary or un-reasonable, but should be based purely on public interest. In case the intended action violates any of the limitations and the parameters, it is bound to vitiate the order.

19. In light of the position narrated above, it is the positive case of the petitioners that the impugned orders are arbitrary and not bonafide and are based on collateral and alien considerations and an act of colourable exercise of power. It is further re-iterated by the petitioners that the orders are in fact in the nature of punishment because the orders are not in the public interest and are patent act of victimisation and as such orders are mala fide.

20. The respondent/State has nothing to place on record which is adverse to the petitioners or which justifies the impugned action of the Government. The record produced by the State is only bunch of papers containing certain Government Orders purported to have been passed by the Government relating to suspension and re-instatement of other employees alleged to have been working with the petitioners and are not relevant to the case, which is again most unfortunate.

21. Learned Counsel for the petitioners has referred to case titled Mohd. Ishaq Khan v. State and Ors. (SWP No.: 1044 of 1987) decided by a Single Judge of this court and also to case titled Syed Mohammad Abdullah v. State (SWP No. : 897 of 1987), wherein orders as in the present petitions were passed by the Government and petitioners therein were also removed prematurely from service. The court quashed the orders of removal of those petitioners and directed that they shall

continue to be in service of the respondents as they were before passing of the said orders.

22. Keeping under consideration the above requirements, conclusions summarised in the foregoing paras and the fact that the respondent/State has miserably failed to bring any service record of the petitioners before the court including their service books and APRs for at least five years prior to the passing of the impugned orders in order to appreciate whether the Government has exercised the powers vested in it bona fide or with mala fides and malice which I have stated in the foregoing paras that they have miserably failed to do so. So it can safely be concluded that the order of premature retirement passed by the State against the petitioners is not at all based on the service records of the petitioners and I can safely conclude and infer that the orders have been passed not with the object of achieving public interest, but just to give the citizen some personal feelings motivated by mala fides and as such, cannot stand light of the day.

23. It may not be out of place to make a mention of the case to which reliance has been placed by the counsel for the State in Rajinder Singh Rana 's case of premature retirement. The concept and the postulations of law laid down therein also do not help the respondent/State. In the said case, the court has opined that there was material available with the respondent/State which justified taking the action against the writ petitioner and prematurely retiring him in public interest. The fact remains that the right to retire a Govt. servant is not absolute, though so worded. 'Absolute' merely means wide and not more. To substantiate this legal concept, reference can safely be made to AIR 1981 SC 70, wherein their lordships of the apex court have held that the order to retire must be passed by the competent authority after forming the required opinion, not subjective satisfaction, but an objective and bona fide one based on relevant material. The policy should be that the retirement of the victim is in public interest, not personal, political or other interest but solely governed by public interest.

24. It has further been laid down by their lordships of the apex court that when an order of premature retirement is put to judicial scrutiny, its validity is challenged,

the order in question can be saved if it is being issued in the public interest i.e. the State must disclose the material on which the order is purported to have been based so that the court may be satisfied that the order is not bad for want of any material whatever, which to a reasonable man reasonably instructed in the law, is sufficient to sustain the grounds of public interest, justifying forced and premature retirement of the public servant. No doubt Judges cannot and should not substitute their judgment for that of the Administration, but they are not absolved of the constitutional obligation to have a maximum judicial review, laid down in Administrative law. The court is confined to the examination of the material merely to see and find whether a rational mind may conceivably be satisfied that the compulsory retirement of the official is justifiable and necessary in public interest. Appropriate authority and not the court makes the decision, but even then scrutiny is necessary to avoid mis-use.

25. For the foregoing reasons, I allow the writ petition and hereby quash the impugned orders bearing No.: FST-295 of 1987 dated September 9, 1987 and order No. 292-FST of 1987 dated September 9, 1987 issued by the respondents No. 1 and the result is that the petitioners shall continue to be in service of the respondents as they were before passing of the impugned orders. The petitioners are also held entitled to the costs of Rs. 1000/- each. The records be returned to Mr. U.K. Jalali, Sr. AAG. The files be consigned to records.